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Appellant's Brief 1976-SC-0446

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**KYSC1976-SC-0446-01**

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# **APPELLANT'S BRIEF**

# SUPREME COURT OF KENTUCKY

File No. 76-446

**LEROY WINSTEAD and  
MARGIE ANN WINSTEAD. . . . . Appellants**

*v.*

**DEPARTMENT FOR HUMAN  
RESOURCES, COMMONWEALTH  
OF KENTUCKY. . . . . Appellee**

**Appeal from Hopkins Circuit Court  
Hon. Thomas B. Spain, Presiding**

## BRIEF FOR APPELLANTS

**FILED**

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**CLEFIC**

**Supreme Court of Kentucky**

This is to certify that on the 2nd day of June 1976, separate copies of this brief were served upon opposing counsel for the adverse party, and on the Trial Judge, pursuant to R.C.A. 1.250.

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# **SUPREME COURT OF KENTUCKY**

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## **BRIEF FOR APPELLANTS**

*MAY IT PLEASE THE COURT:*

### **STATEMENT OF THE QUESTIONS PRESENTED**

1. Did not the Department of Human Resources arbitrarily and unreasonably withhold its consent for the purpose of permitting adoption by the Appellants?
2. Did not the Lower Court commit error in refusing to permit the Appellants to introduce evidence as to the issue of unreasonableness and arbitrariness?

## STATEMENT OF THE CASE

The facts of this case are simple, and for the convenience of this Court, the facts are in sequence set forth in the following paragraphs. For the further convenience of this Court, the Appellants will hereinafter be referred to as the Winstead's, and the Department for Human Resources, Commonwealth of Kentucky, will hereinafter be referred to as the Department.

On September 30, 1974, the infant child involved in this adoption proceeding was brought to the home of the Winstead's by a social worker for the Department. At this time the infant girl was only four (4) days old. (T.R. 10)

The child was placed in the Winstead home under a Foster Home Agreement, which was not signed by Mr. Winstead. The representative for the Department knew that Mr. Winstead's name had been forged to the instrument.

When the child was brought to the home of the Winstead's, they were told the child would only remain there for a short period of time. (T.R. 10)

As weeks and months passed, the Winstead's became strongly attached to the infant child and approached the Department to obtain permission to file the necessary application for placement for adoption purposes.

The Winstead's were told one story and then another, and continued to be given various excuses and reasons by various representatives of the Department that the child could not be adopted. At

one point, they told the Winstead's that the parental rights of the father had to be terminated, but this was simply not true, inasmuch as the child was an illegitimate child, the father being a United States Serviceman, stationed in Germany. The natural mother is a German citizen and has since returned to Germany.

The Winstead's were threatened by the Department that if they even took the slightest step toward obtaining an application in order to adopt the child that the child would be immediately taken from them. The Winstead's refrained from taking any steps hoping that the Department would later change its mind.

Finally, on September 4, 1975, a representative of the Department came to the Winstead's home and took the child. When the Winstead's inquired of the representative what would be done if they refused to give the child up, they were told by the social worker that they would contact the sheriff of Hopkins County and he would come and get the child.

After the child had been removed from the Winstead's home over their objections, the Winstead's contacted their present attorney and a Petition for Adoption was filed in Hopkins Circuit Court.

The Department in furtherance of their arbitrariness, willful and capricious acts, shortly after the child was removed from the Winstead's home, took the child to Trigg County where it was placed in a strange home.

A meeting was arranged in Frankfort, with Jerry B. Hisson, Commissioner for the Department for Human Resources at which time the Winstead's were present, along with State Representative, William T. Brinkley, State Senator, Kenneth Gibson, and various other employees of the Department. This meeting was held subsequent to the filing of the Petition for Adoption. Upon the conclusion of the meeting, the Commissioner decreed that he, the Department, and the employees of the Department would not permit the child to be adopted by any other person or persons until the Winstead's had exhausted their legal remedies in their efforts to adopt the infant child.

Following this decree by the Commissioner, for the Department for Human Resources, and shortly prior to the hearing upon the Department's Motion to Dismiss the Petition for Adoption, the Commissioner and the Department through its representatives took active steps to initiate the adoption of the infant child by other parties in Trigg County, Kentucky.

Upon the hearing in the Hopkins Circuit Court relative to the Department's Motion to Dismiss the Lower Court refused to permit the Winstead's to introduce any evidence in opposition to the Motion.

The Lower Court refused to hear any evidence upon the main and only issue actually involved in the case and that being as to whether or not the Department withheld its consent for adoption from the Winstead's arbitrarily and unreasonably.



## ARGUMENT

(1) THE DEPARTMENT OF HUMAN RESOURCES MAY NOT ARBITRARILY AND UNREASONABLY WITHHOLD ITS CONSENT FOR THE PURPOSE OF PERMITTING AN ADOPTION.

(2) THE LOWER COURT COMMITTED ERROR IN REFUSING TO PERMIT THE APPELLANTS TO INTRODUCE EVIDENCE AS TO THE ISSUE OF UNREASONABLENESS AND ARBITRARINESS.

This case represents a typical example of how far a governmental agency will go to exercise their unbridled authority when they have been permitted to do so by the Legislature and the Courts for a continuous period of time.

The infant child, only four (4) days old, was placed in the home of the Winstead's supposedly for a short period of time. The representative of the Department had personal knowledge of the fact that the name of Mr. Winstead had been forged to the Foster Home Agreement. Still this did not bother the Department. That during the entire time that the infant child was at the Winstead's they attempted to adopt the child. They asked various employees of the Department that they be given the opportunity to make application to adopt the child.

The various representatives and employees of the Department told them over and over again, using one excuse and then another excuse, that they could not adopt the child.

At the hearing before the Commissioner of the Department, they told the Winstead's that they could have adopted the child if they had filed the Petition when the child was in their home.

The child had been with the Winstead's since birth, and there is no doubt, and the Department has not even attempted to contradict, that the child had fallen in love with the Winstead's, and of course the Winstead's dearly loved the child. The Courts have continued to hold that the well-being of the child should be paramount in all adoption proceedings.

The Department in this case as it has in other cases dealt with the child as though it was a chattel. A chattel which they could transfer from one county to another county for the mere sake of pleasing the Department and its employees.

The Department based its argument upon KRS 199.470, subsection 3, and upon the argument that the Winstead's had not made an application to receive the child into their home for the purpose of adoption.

This idiotic argument was bought by the Lower Court.

The only purpose of making an application for the purpose of receiving a child for adoption is to permit the Department for Human Resources to receive information that it did not have otherwise as

to the background of the individuals wanting to adopt a child.

In this case, the Winstead's had been foster home parents working closely with the Department for Human Resources for over five years. The Department has even conceded that the home of the Winstead's was probably the best foster home in Hopkins County, yet they gave to the Lower Court, the excuse that the Winstead's had not made an applicaton to receive the child for adoption and which was unbelievably acquiesced in by the Lower Court.

The other argument which the Lower Court also bought relates to KRS 199.470 subsection 3, heretofore related to above, which states that "No petition for the adoption of any child under the age of 16 shall be filed until after the child has lived continuously in the home of the petitioners for at least three months."

There is no language contained in the statute that says that the child has to be physically present in the home of the time the Petition is filed. Suppose this child had been taken by the Winstead's to a hospital where it was confined, would that mean that during this hospital confinement that a Petition for Adoption could not be filed? Of course not!

This child had lived in the Winstead's home for a period of one year, and surely that meets a greater requirement than the statutory requirement of living continuously in the home for at least three months.

In *Commonwealth Department of Child Welfare v. Jarboe*, Ky. 464 SW 2d 287, this Court held that if the consent of the Department for Human Resources was withheld unreasonably and arbitrarily, then the Lower Court could hear the case on the merits and determine whether or not the Department of Human Resources did withhold their consent unreasonably and arbitrarily. Of course, the only way the Lower Court could have determined as to whether or not the Department had withheld their consent unreasonably and arbitrarily was to have given the parties an opportunity to present evidence to establish this fact.

Approximately 20 witnesses were present on the day of the hearing to testify on behalf of the Winstead's as to the unreasonable, arbitrary, and capricious acts of the Department.

The Guardian Ad Litem for the infant child, who had been appointed by the Hopkins Circuit Court, when asked by the Lower Court if there was anything he would like to add as to what had already been stated by both attorneys, informed the Court to-wit:

MR. MONHOLLON:

"It seems that the Department for Human Resources denied these people the right to seek an adoption and then, on the other hand, the Department of Human Resources tried to take the child and they have control over the child and tried

to take the child and it's a matter of which the Petitioners have absolutely no control. It seems to be rather unfair what the Department of Human Resources had done in this instance. I agree with Mr. Nall." (T.R. 21)

In spite of the position taken by the Guardian Ad Litem for the infant child, the Lower Court completely ignored the Guardian Ad Litem, and went along with the Department.

Chapter KRS 199 governing adoption proceedings sets no standards or guidelines for the Department for Human Resources to follow. It places total discretion in the Department of Human Resources to determine when and what child may be adopted. The statutes further makes the Department the sole arbiter of what, if any, guidelines should be applied in adoption cases.

Article II of the Kentucky Constitution provides:

"Absolute and arbitrary power over the lives, liberty and property of free men exist nowhere in a Republic, not even in the largest majority."

It has long been held by the Kentucky Court of Appeals that this Constitutional provision prohibits placing unbridled discretion in administrative agencies or boards.

The reason is obvious to do so would allow

government by rule of men rather than law. If the Department of Human Resources is to determine absolutely when, what child, and where an adoption can be had or when a person can make an application for an adoption, then the Courts become useless and revert to mere administrative posts which merely rubber-stamps the decisions of the Department of Human Resources.

The refusal by the Department to permit the *Petitioners* to make an application for permission to receive the child for adoption was unreasonably and arbitrarily withheld. For the Lower Court not to have heard the case upon the merits, as it did, was simply the condoning of the acts of the Department and giving to it absolute power in violation of Article II of the Kentucky Constitution.

The Department of Human Resources has ignored the best interests of this child inasmuch as it took the child from where it had been since four (4) days old. It took the child from a home which had already demonstrated its love and from a home where the child would not want for anything that a child needs in becoming an emotionally stable adult to live as a beneficial member of society.

The Lower Court clearly erred by refusing to permit evidence to be introduced by the *Winstead's*, and for that reason this cause should be remanded to the Lower Court for a hearing upon the merits of the case.

## **CONCLUSION**

For the reasons set forth in this Brief, the Appellants respectfully request that the judgment of the Lower Court be reversed, and that this cause be remanded for a hearing upon the merits before the Lower Court.

Respectfully Submitted

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